

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.

Application No. 15-05-014
(Filing Date: May 14, 2015)

**REPLY BRIEF
OF
THE CITY OF SANTA ROSA**

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In accordance with the schedule set forth in the Scoping Memo and Ruling of Assigned Commissioner dated December 11, 2015, the City of Santa Rosa (“City”) respectfully submits its Reply Brief in response to the Opening Brief of the Safety and Enforcement Division (“SED”).

I. INTRODUCTION

SED stakes its opposition to the City’s application for Commission approval of an at-grade pedestrian and bicycle crossing at Jennings Avenue on the proposition that the City has failed to demonstrate that a grade separation is “not practicable” to construct. To support its fundamental premise, SED argues as follows:

- (1) The proposed at-grade pedestrian and bicycle crossing at Jennings Avenue is a heavy rail crossing;
- (2) The Commission’s standard for determining the practicability of grade separating a heavy rail crossing is different from the standard for determining the practicability of grade separating a light rail crossing;

(3) The “practicability” standard applicable to a heavy rail crossing is set forth in *City of San Mateo v. SoPac Transp. Co.*, D. 82-04-033, 1982 Cal. PUC LEXIS 1317 (April 6, 1982) and requires the City to demonstrate that a grade separation cannot be physically constructed.¹

(4) The “practicability” test as interpreted by SED applies to pedestrian/bicycle crossings.

The City acknowledges that its application involves a heavy rail transit crossing and that the proposed at-grade pedestrian and bicycle crossing is subject to the Commission’s “practicability” standard. The City, however, contests SED’s fundamental premise that the Commission’s “practicability” test differs when applied to heavy rail crossings as opposed to light rail crossings. Commission Rule 3.7(c)(2) which governs the Commission treatment of all at-grade crossing applications makes no distinction between heavy rail and light rail crossings. SED has so admitted.²

Nevertheless, SED continues to rely on the 1982 *City of San Mateo* case to support its central argument that the Commission’s standard of review for heavy rail crossings differs from its treatment of light rail crossings. As noted above, SED’s interpretation of applicable Commission precedent and policy is wrong and in contradiction of its own admission. In D. 14-08-045 issued in 2014, the Commission sets forth the scope of the “practicability” test to be applied under Commission Rule 3.7(c)(2) and expressly states that the “practicability” test, as defined in the decision, applies to all

¹ SED Opening Brief at 3.

² City Opening Brief at 17.

at-grade crossing applications, including light-rail transit, passenger railroad, and freight railroad crossings.³

In predicated its opposition to the City's application principally, if not solely, on the basis of its argument that a grade separation can be physically located at Jennings Avenue, SED did not consider the practicability of a grade separation at Jennings Avenue based upon the well-established Commission criteria for making such determination. Consequently, SED failed to evaluate the City's proposed at-grade pedestrian and bicycle crossing in the manner required by Rule 3.7(c)(2).

SED's extremely limited analysis of the merits of the City's proposed at-grade crossing gives no consideration to the range of safety and non-safety related issues that must be reviewed in compliance with Rule 3.7(c)(2). Nor did SED give any consideration to the safety and non-safety related concerns associated with construction of a grade-separated crossing at Jennings Avenue, which information is certainly relevant to the Commission's review of the City's application. .

As set forth in its Opening Brief and as argued further below, the City has fully met its burden of showing the impracticability of a grade separation at Jennings Avenue while SED addresses none of the Commission's established criteria for evaluating the practicability of a grade separation. The City has fully shown by convincing evidence that the proposed at-grade pedestrian and bicycle at Jennings Avenue is safe and in the public interest. In contrast, SED has provide little or no factual support for its recommendation that a grade separation be constructed at Jennings Avenue.

³ *In the Matter of the Application of LA MTA*, Decision No. 14-08-045; 2014 Cal. PUC LEXIS 418, *15; the Commission's application of the seven criteria to be evaluated under Rule 3.7(c)(2) makes no distinction between at-grade crossing proposals involving light rail versus heavy rail transit.

II. ARGUMENT

A. SED Has Not Properly Applied the Commission's Standard for Determining the Practicability of a Grade Separation Nor Has SED Considered Any of the Facts Relevant to Such a Determination.

SED grounds its case in opposition to the City's application on the assertion that a grade separation can be physically located at Jennings Avenue, thereby rendering it "practicable." SED's position, reflected in its testimony and its Opening Brief, relies on the Commission's 1982 decision in *City of San Mateo v. Railroad Comm'n of California*, 8 CPUC2d 572, involving a heavy rail crossing.⁴ As anticipated by the City,⁵ SED now attempts to justify its entire case with the argument that the Commission has one standard for evaluating a grade separation involving a heavy rail crossing and a different standard for evaluating a grade separation involving a light rail crossing. SED's position in this regard is in direct conflict with relevant Commission precedent.

The City recognizes that safety issues related to heavy rail crossings may well differ from safety issues presented by a light rail crossing. SED's effort, however, to distinguish between heavy rail and light rail crossings with respect to application of the Commission's "practicability" test is precluded by express (post-1982) Commission statements to the contrary.

The *City of San Mateo* does not represent current Commission policy regarding the scope of the "practicability" test either with respect to heavy rail crossing or light rail crossings. In various subsequent decisions, the Commission has addressed and refined the Rule 3.7(c)(2) "practicability" test. While such decisions were issued in the context of

⁴ SED's citation to the 1937 California Supreme Court case, *San Mateo v. Railroad Com. of California* provides no relevant information bearing upon the Commission's interpretation of the Rule 3.7(c)(2) "practicability" standard.

⁵ City Opening Brief at 18.

Commission consideration of light rail crossings, the Commission is quite clear in its statement that the seven, specific criteria to be applied in meeting the requirements of Rule 3.7(c)(2) apply to all at-grade crossings and not just to light rail crossings. There is no basis for SED's contention that the Commission has retained the *City of San Mateo* "practicability" test for heavy rail crossings, much less that it applies to the City's proposed at-grade pedestrian and bicycle crossing at Jennings Avenue.

Conclusion of Law No. 2 of D. 02-05-047 reads as follows:

Practicability embraces more than the concept of whether a crossing can be physically built. When making a judgment about practicability we must consider the effectiveness of safety measures, the analysis of our staff, the opinions of local civic and emergency authorities, the opinion of the public, and the cost of a separation in comparison with an at-grade solution.⁶ (emphasis the added).

Decision 14-08-015 reflects a more recent Commission expression of the various parameters of the "practicability" test as embodied in Rule 3.7(c)(2). SED's witness admits that Rule 3.7(c)(2) does not make any distinction between light rail and heavy rail crossings.⁷ There is but one Commission-established test of practicability under Rule 3.7(c)(2), and it applies equally to light rail and heavy rail crossings. As quite clearly stated in D. 14-08-015, the Commission's adopted practicability test, based upon evaluation of seven criteria, applies to "all at-grade crossing cases (light-rail transit, passenger railroad, and freight railroad)."⁸

Nevertheless, in contravention of the Commission's express directive and its witness's own admission, SED continues to argue that there is a different standard for heavy rail crossings than there is for light rail transit crossings in determining

⁶ *In the Matter of the Application of Los Angeles to Pasadena Metro Blue Line Construction Authority* ("Blue Line"), 2002 Cal. PUC LEXIS 301, *13.

⁷ Transcript Volume 2 at 210, Ins. 18-22.

⁸ D. 14-08-045; 2014 Cal. PUC LEXIS 418, *15.

“practicability.” As a consequence of its misplaced reliance on an obsolete definition of “practicability,” SED has ignored six of the seven criteria established by the Commission as pertinent to its evaluation of the practicability of grade separating the crossing at Jennings Avenue. SED did not address, much less contest the City’s showing in support of the at-grade pedestrian and bicycle crossing at Jennings Avenue, including evidence of: (1) the public need for the at-grade crossing; (2) compliance with all applicable Commission safety standards and requirements; (3) the concurrence of local community and emergency authorities; (4) uniform support for the at-grade crossing from the general public as well as from the neighboring residents most likely to be affected by an at-grade crossing; (5) the comparative costs of an at-grade crossing with a grade separation; and (6) Commission approval of a similarly situated pedestrian and bicycle crossing of the SMART rail tracks in Rohnert Park.

SED’s opposition to the City’s application is based upon a premise that is fundamentally at odds with Commission policy, i.e. that the Commission must reject an at-grade crossing of a heavy rail corridor if it is physically possible to grade separate the crossing. SED’s formulation does not reflect the Commission standard for reviewing and resolving an application to construct an at-grade crossing. Commission review of an application for an at-grade crossing, whether involving heavy rail or light rail transit, contemplates a comprehensive analysis and consideration of a variety of criteria, all but one of which have not even been addressed by SED. The City submits that Commission policy, while assigning paramount importance to safety of the public, also contemplates consideration of other aspects of the public interest.

B. SED Continues to Ignore the Record Establishing the City's Thorough and Careful Consideration of the Crossing Alternatives and Unfairly Question the City's Deliberative Process.

1. The record reflects that the City has thoroughly reviewed and considered the safety and other public interest issues related to both the proposed at-grade crossing and the grade separated alternative.

SED's inflammatory and presumptuous claim that the City has condoned trespassing has no basis in fact and should be ignored. Any such accusation, albeit inappropriate, could be applied with equal force to SED. SED's purported understanding of what, if anything, was in the minds of the City's decision-makers with regard to SED's mandate to reduce the number of at-grade crossings is self-serving. Its assertion that the City has placed "too high a value on convenience and aesthetics at the expense of public safety" is speculative as well as belied by the substantial evidence of record.⁹

SED chooses to ignore the evidentiary record when it implies, albeit incorrectly, that convenience and aesthetics, rather than public safety, motivated the City Council's preference for the at-grade alternative. The evidence of record reflects extensive information considered by the City Council in its deliberations. It shows that the City undertook a comprehensive review of the facts bearing upon safety and other public interest issues related to both the at-grade proposal and the grade-separated alternative. Specifically, the record reflects the following showing made by the City:

- (1) demonstration of the need for a properly protected at-grade crossing at Jennings Avenue and the importance of such a crossing to neighborhood connectivity;
- (2) the safety of the proposed at-grade pedestrian and bicycle crossing and its compliance with all applicable safety standards;

⁹ SED Opening Brief at 12.

(3) support for the proposed at-grade crossing by the City Council, SMART, the City's fire and police chiefs, participants in the public participation hearing, and neighborhood residents and businesses most affected by a crossing, whether at-grade or separated; and

(4) the excessive cost of a grade separation, the anticipated delay associated with funding and construction of a grade separation, the size (including visual impact) and extensive ramping associated with an overcrossing, its function as a barrier dividing neighborhood residents and businesses, in addition to safety concerns and difficulty of access for the elderly, disabled, and parents of school children.

The contrast between the substance and quality of the City's showing and SED's evidentiary presentation is a matter of record. As set forth in its Opening Brief, the City has argued that SED's case in opposition can be characterized as lacking specific, fact-based evidence relating to the safety of either an at-grade or grade-separated crossing of Jennings Avenue.¹⁰ As a further example of SED's reliance on theory rather than fact, SED continues to portray SMART's passenger rail service as a more problematic "high speed" operation in contrast to light-rail transit systems which "operate at lower speeds" because of lower distances between stations.¹¹ The record, however, in this proceeding shows that the lower distances between SMART stations in Santa Rosa dictate a maximum speed of 45 mph at the Jennings Avenue location.¹²

¹⁰ City Opening Brief at 18-21.

¹¹ SED Opening Brief at 5.

¹² Direct Testimony of Jason Nutt; SR-1 at 13.

2. The City and SCLTC have both presented probative evidence regarding safety and other public interest concerns related to a grade separation at Jennings Avenue.

Given SED's failure to consider any safety issues (or anything other than required clearances) related to an overcrossing, SED's effort to discredit the City's and SCLTC's evidence specifically addressing safety and non-safety concerns related to a grade-separated crossing must be met with skepticism.¹³

The City and SCLTC have presented testimony sponsored by competent witnesses that shows the following:

(1) the City's police and fire chiefs have reported that urban/suburban grade-separated crossings have a higher instance of crime and illicit activity than at-grade crossings and that there are increased challenges to provide services to a grade-separated crossing over an at-grade crossing, including access.¹⁴

(2) the switchbacks obstruct site lines and create personal safety concerns;

(3) the extended slopes and limited confines of the overcrossing represent an attraction for potentially unsafe activities like skateboarding,

(4) the eight percent slope, while compliant with ADA, particularly during inclement weather, will present hazards, particularly for the elderly, disabled, and parents with small children;

(5) the structure would create a vertical barrier dividing an established neighborhood, encouraging increased vehicular use while diverting pedestrian and

¹³ *Id.* at 18.

¹⁴ *Id.* at 22.

bicycle traffic to alternatives that could well be less safe than a properly protected at-grade crossing at Jennings Avenue.¹⁵

(6) The support columns provide hiding places for perpetrators to jump their victims, particularly at night. Places without constant use and “eyes-on” are also subject to vandalism.¹⁶

The above-referenced testimony is directly relevant to the basic question now before the Commission, i.e. whether the public interest is best served by an at-grade crossing or a separated-grade crossing. It is probative, and it is within the discretion of the presiding administrative judge to afford it the weight deemed appropriate. SED’s failure to give any consideration to the issue of the safety of an overcrossing certainly provides no basis for discounting the relevant evidence provided by the City and SCLTC.

III. CONCLUSION

The evidence reflects that the City has demonstrated the impracticability of a grade separation at Jennings Avenue pursuant to Commission Rule 3.7(c)(2) and has shown by clear and convincing evidence that the proposed at-grade pedestrian and bicycle crossing at Jennings Avenue is safe and in the public interest.

SED, on the other hand, has failed to justify its recommendation that Jennings Avenue be grade separated. SED’s limited case in support of a grade separation essentially consists of the following:

(1) SED’s opinion, unsupported by any fact-based analysis, that a grade-separated crossing is superior to an at-grade crossing at Jennings Avenue because it inherently presents a lower risk of pedestrian/train conflict;

¹⁵ City Opening Brief at 23.

¹⁶ Direct Testimony of Lois Fisher; SCLTC-9 at 2-3.

(2) Federal and state policies that generically favor grade-separated crossings in general and gross statistics regarding accident incidents at unspecified at-grade crossings throughout the state and the nation;

(3) the physical possibility of constructing a grade separation at Jennings Avenue;
and

(4) the City's rejection of an \$8 million grant from the Metropolitan Transportation Commission that would have funded a significant portion of the cost of constructing a grade separation at Jennings Avenue.

SED has failed to provide sufficient fact-based evidence to support a Commission finding that a grade separation rather than an at-grade crossing better serves the public interest.

Simply stated, the City has made its case, and SED has not.

Respectfully submitted on April 29, 2016 at San Francisco, California.

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